FILED
DEC 6 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-716

In the Supreme Court of the United States

OCTOBER TERM, 1988

ROBERT DOUGLAS COOK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in reversing an order suppressing as evidence cocaine and other items seized from an apartment pursuant to a search warrant.

On December 8, 1987, petitioner was indicted by a federal grand jury sitting in the District of Colorado. He was charged with possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Petitioner moved to suppress cocaine and other items that were seized from his apartment pursuant to a search warrant issued by a state court judge. In his motion to suppress, petitioner claimed that the supporting affidavit did not contain sufficient facts to justify the issuance of the warrant. On January 20, 1988, after an evidentiary hearing, the district court issued an oral order granting the motion. The court stated without elaboration that the affidavit did not establish probable cause for the issuance of a warrant

and that the executing officers could not have relied on the affidavit in good faith.

The court of appeals reversed (Pet. App. A1-A5). The court concluded that the district court erred in refusing to apply the good faith exception to the exclusionary rule adopted in *United States* v. *Leon*, 468 U.S. 897 (1984). In reaching its decision, the court of appeals assumed but did not hold that the affidavit failed to establish probable cause.

Petitioner contends (Pet. 3-5) that the search warrant was based on a "bare-bones" affidavit that contained insufficient facts to justify a conclusion that the executing officers' reliance on the warrant was objectively reasonable. Whatever the merits of petitioner's contention, it is not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his current claim to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.*

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* Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

DECEMBER 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—241 699 00003